

Docket No. 1,044,293

Respondent requested review of the September 21, 2010 Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on February 18, 2011.

George H. Pearson, of Topeka, Kansas, appeared for the claimant. Bryce D. Benedict, of Topeka, Kansas, appeared for respondent and the State Self-Insurance Fund (respondent).

The Board has considered the record and adopted the stipulations listed in the Award.

### ISSUES

The ALJ found that the claimant sustained a 22 percent whole body functional impairment along with a 51.5 percent permanent partial general (work) disability based upon a 19 percent task loss<sup>1</sup> and an 84 percent wage loss.

The respondent requests review of the nature and extent of claimant's disability, arguing the evidence fails to document any permanent impairment to the neck. Therefore, the Award should be modified to reflect only a scheduled injury to the shoulder. In the alternative, respondent contends the ALJ's finding as to claimant's task loss should be modified to the 5.8 percent opined by Dr. Sankoorikal as, in respondent's view, that percentage is more accurate and reflective of claimant's actual job tasks during the relevant period.

Claimant's argues that the ALJ should be affirmed in all respects.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award accurately and succinctly sets forth the facts and circumstances surrounding the claimant's accidental injury, her subsequent treatment and the varying opinions of the testifying physicians. The Board therefore adopts that statement as its own.

The sole issue to be determined in this appeal is the nature and extent of claimant's impairment. The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>2</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>3</sup>

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is

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<sup>1</sup> This figure represents an average of the task loss opinions offered by Drs. Edward Prostic and Joseph Sankoorikal.

<sup>2</sup> K.S.A. 2008 Supp. 44-501(a).

<sup>3</sup> K.S.A. 2008 Supp. 44-508(g).

not bound by medical evidence presented in the case and has a responsibility of making its own determination.<sup>4</sup>

Respondent takes issue with the ALJ's conclusion as to both the ALJ's assignment of functional impairment as well as her conclusion that claimant is entitled to a work disability under K.S.A. 44-510e(a). Distilled to its simplest terms, respondent argues that claimant's injury resulted in an impairment to her upper trapezius area, an area that is "best characterized as structures of the shoulder girdle"<sup>5</sup> and not to the neck. And because the resulting impairment, the *situs* of the impairment, is to a scheduled body member, claimant's recovery is limited to that available under K.S.A. 44-510d and a work disability, as provided for in K.S.A. 44-510e(a) is statutorily precluded. Respondent suggested at oral argument that a shoulder impairment rating could be fashioned, using the principles set forth in the *Guides*<sup>6</sup> based upon Dr. Sankoorikal's testimony and ultimate 7 percent whole body rating.

The ALJ noted this argument in her Award -

Respondent contends that [c]laimant has a scheduled injury and is not entitled to a permanent partial general disability award. It is unclear as to why [r]espondent believes [c]laimant has a scheduled injury. Both doctors who testified found that [c]laimant had an injury that resulted in an impairment or disability to the cervical spine area of her body. As Dr. Sankoorikal said "that is why this is a body as a whole injury." It is found and concluded that [c]laimant has a body as a whole injury.<sup>7</sup>

Like the ALJ, the Board is persuaded that claimant sustained a cervical or neck impairment as a result of her injury. While it is true that the majority of her complaints focused on the trapezius area of her body, the medical testimony reveals that these complaints do not relate solely to a shoulder or an upper extremity problem. Rather, the muscles in that area are connected to the cervical spine "and that's the reason the pain is mostly between the shoulder and the neck . . ."<sup>8</sup> Dr. Sankoorikal even illustrated his findings by drawing on a diagram of the human body, showing the musculature that is affected and this drawing quite clearly implicates the cervical spine. Both physicians assigned a whole body impairment for these trapezius complaints and explained how they

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<sup>4</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

<sup>5</sup> Respondent's Brief at 1 (filed Oct. 29, 2010).

<sup>6</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are to the 4th edition unless otherwise noted.

<sup>7</sup> ALJ Award (Sept. 21, 2010) at 5.

<sup>8</sup> Sankoorikal Depo. at 23.

determined their respective ratings, Dr. Sankoorikal assigning a 7 percent while Dr. Prostic assigned a 22 percent. Neither of these physicians testified that claimant's impairment was limited to her upper extremity. For these reasons, the Board concurs with the ALJ's conclusion that claimant sustained a whole body injury as a result of her injury.

The ALJ went on to adopt Dr. Prostic's impairment finding of 22 percent, finding that his analysis of claimant's condition was more persuasive than that offered by Dr. Sankoorikal. After reviewing the entirety of the record, the Board finds that the ALJ's decision should not be disturbed. The 22 percent functional impairment finding is affirmed.

When, as here, an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

Computing an employee's work disability under this statute is merely a mathematical exercise in light of recent Supreme Court opinions.<sup>9</sup> The trier of fact need only determine the claimant's task loss and actual wage loss, and then average the two to find the claimant's resulting work disability.

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<sup>9</sup> *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

Respondent took no issue with the wage loss prong of this equation as the ALJ used the information contained within the record and concluded claimant's actual wage loss, based upon her post-injury wages, was 84 percent. Respondent did, however, argue that Dr. Sankoorikal's task loss opinion, 5.8 percent, was more credible than that offered by Dr. Prostic. The basis for this argument comes from the testimony and cross examination of Dr. Prostic. Dr. Prostic eliminated 4 tasks from the list as he concluded claimant would be unable to restrain juvenile offenders given her present condition. But respondent contends that claimant was only once required to restrain juveniles while employed in that position and therefore, Dr. Prostic's task analysis was, in essence, inaccurate as she did not, in reality, sustain a loss of a task that she had done on such a rare basis.

After considering both task loss opinions, the ALJ elected to average the two and assigned a 19 percent task loss. The Board has considered and rejected respondent's argument involving the frequency of 4 of claimant's previous job tasks. The applicable statute requires the finder of fact to consider the claimant's previous tasks regardless of their frequency. Thus, the Board finds the ALJ's approach of averaging the two task loss opinions reasonable and affirms the 19 percent task loss.

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated September 21, 2010, is affirmed in its entirety.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: George H. Pearson, Attorney for Claimant  
Bryce D. Benedict, Attorney for Respondent and State Self-Insurance Fund  
Rebecca Sanders, Administrative Law Judge